

LFC Requester:**Caroline Malone**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date Jan. 18, 2016

Bill No: HB 99

Sponsor: Reps. Pacheco and Nunez

Agency Code: 305

Short Driver's License Issuance and

Person Writing Sean Cunniff

Title: Federal REAL ID

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---------------|------|------------------------------|------------------|
| FY16 | FY17 | | |
| | | | |
| | | | |

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------------|------------------|
| FY16 | FY17 | FY18 | | |
| | | | | |
| | | | | |

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY16 | FY17 | FY18 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| Total | | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

HB 99 proposes the creation of two facially distinct types of driver's licenses and state-issued personal identification cards ("ID Cards"): one type of licenses/ID cards that can be used for "official federal purposes" and one that can only be used for "driving privileges." Only those persons who can establish "lawful presence in the United States" are eligible for the license/ID type that may be utilized for official federal purposes, which will continue to be called a "Driver's License" (or Identification Card). Persons unable to establish "lawful presence," who can meet certain criteria (such as having filed a state income tax return or proof of 2 years of continuous presence in NM), are eligible for a "Driving Privilege Card." The legislation does not apparently provide for the issuance of ID Cards to persons who cannot establish lawful presence in the U.S.

Other noteworthy provisions:

- The "color and design" of the Driver's License shall be "distinct" from the Driving Privilege Card, and the Driver's License "shall" meet "federal requirements to be accepted by federal agencies for official federal purposes;"
- Expiration dates for Driver's Licenses/ID Cards issued to foreign nationals are set depending upon the circumstances of the applicant, but are generally subject to termination in the event the applicant can no longer establish proof of continued lawful presence in the United States;
- Driving Privilege Cards shall expire annually.
- Existing criminal sanctions applicable to the "unlawful use" of a Driver's License are extended to the Driving Privilege Card;
- For both the initial issuance and renewal of a Driver's License and ID Card, the applicant must provide "proof of age" through documentation, such as a passport;
- Foreign nationals seeking a Driver's License or ID Card must furnish documentary proof of lawful presence in the U.S.;

- Several new felonies are created for crimes connected to the application, issuance, and use of Driver's Licenses, Driving Privilege Cards, and ID Cards.

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

HB 99 is an effort to address the requirements of the federal REAL ID Act of 2005 ("REAL ID"), which is in the process of being implemented by the United States Department of Homeland Security ("DHS").

REAL ID establishes mandatory standards governing state issuance of secure driver's licenses and identification cards. Residents of states which fail to comply with REAL ID will ultimately be unable to utilize their state-issued identification cards to board airplanes, enter federal buildings, or for a range of other "official [federal] purposes." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312 (May 11, 2005). New Mexico is currently in the process of complying with the terms of REAL ID, but many of the state's provisions governing the issuance of driver's licenses and identification cards remain inconsistent with the requirements of the federal law.

DHS has repeatedly delayed implementation of REAL ID, but has recently indicated that full implementation of the law is slated for early 2018. Nothing precludes piecemeal implementation of the law in the interim, however, as indicated by the recent decision of White Sands Missile Range to no longer accept New Mexico-issued licenses for access to that facility.

The changes proposed in HB 99 addressing the issuance of licenses and identification cards to foreign nationals and others conform to certain standards set forth in the REAL ID Act for secure licenses. Like REAL ID, HB 99 imposes the requirement that secure licenses be issued only to a person able to evidence lawful presence in the United States, and that such licenses and identification cards be valid only for a period that conforms to the person's period of lawful presence in the United States. See 6 CFR Parts 37.11 and 37.21.

However, in order for a state to issue licenses that are acceptable for federal purposes, all REAL ID provisions must be satisfied, and HB 99 does not appear to address a number of provisions set forth in the federal law. To be clear, under REAL ID, states must comply with all substantive provisions of the federal law to achieve "full compliance." 6 CFR Part 37.51. Any card issued by a state for personal identification purposes that falls short of full compliance "is not in compliance with [REAL ID]...and is not acceptable as identification by Federal agencies for official purposes." 6 CFR Part 37.65.

Examples of some inconsistencies between the requirements set forth in HB 99 and REAL ID include the following:

1. REAL ID generally requires that non-foreign national applicants provide proof of a valid Social Security number. See 6 CFR Part 37.11(e). While it is clear that applicants must furnish a Social Security number, it is not apparent that the applicant must provide satisfactory proof thereof.
2. REAL ID requires that the state "must" take and maintain photographs of every applicant for a REAL ID card, regardless of whether the card is issued. 6 CFR Part

- 37.11. HB 99 contains no such provision.
3. REAL ID requires that states verify documents submitted by applicants used to establish identity. 6 CFR Part 37.13. HB 99 contains no such provisions.
 4. REAL ID requires states to implement a security plan for state motor vehicle facilities. 6 CFR Part 37.41. No mention is made of such a plan in HB 99.

While many of these issues may be within the scope of the Taxation and Revenue Department's rulemaking authority, more clarity in the legislation may aid in eliminating doubt with respect to the wishes of the Legislature and provide the agency with clear authority to promulgate appropriate and necessary rules.

Finally, it should be noted REAL ID does authorize states to issue licenses and identification cards that are not compliant with REAL ID. Thus, as proposed in HB 99, states may have tiers of drivers licenses, based upon whether a given license is in compliance with REAL ID. As this legislation requires, under REAL ID, non-compliant cards must be clearly identified as such and feature a design distinctive from compliant cards.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

Because the legislation may result in the enactment of distinctions in legal rights based upon the alienage (or nationality) of the applicant, it potentially runs afoul of state and federal constitutional provisions that demand equal treatment of people by the government. See N.M. Const. art. II, § 18; U.S. Const. amend. XIV; see generally Alexander L. Mounts, Note, A Safer Nation? How Driver's License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists, 37 Ind. L. Rev. 247 (2003). It is well-settled that non-citizens enjoy constitutionally-granted equal protection rights. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In New Mexico, where the people are afforded heightened constitutional equal protection rights, disparate treatment of a disfavored group potentially gives rise to especially searching scrutiny by the judiciary. See, e.g., Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, 138 N.M. 331.

The courts are especially skeptical of government actions which withdraw existing rights from such disfavored groups. See Romer v. Evans, 517 U.S. 620 (1996); Perry v. Brown, 671 F.3d 1052, 1079-1080 (9th Cir. 2012). HB 99 would almost certainly have the effect of preventing certain currently licensed foreign national motorists from maintaining driver's licenses, especially those unable to establish two years of presence in the State, or other criteria imposed on such applicants. If the courts of New Mexico or the United States find that legislation affronts basic constitutional protections, it will be invalidated. See, e.g., Griego v. Oliver, 2014-NMSC-003.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If New Mexico does not come into compliance with REAL ID, the state runs a high risk that it will be unable to issue its residents identification cards that can be used for federal purposes.

AMENDMENTS

1. Defining certain terms employed in the legislation may aid in clarifying legislative intent. Examples include terms such as “arrival-departure record,” “deferred action for childhood arrivals,” and “official federal purposes.”
2. Perhaps references to “licenses” in the statute should be amended to read “driver’s licenses,” to ensure that references to the newly-defined category of “driver’s licenses” is clear.